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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACOB FRIEDLAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review[1]

A.1. Whether a person who takes no action, makes no decision, has no duty, and possesses no *de facto* control or influence with respect to the investment or distribution of pension fund assets can, consistent with the statutory language, congressional intent, and due process notice requirements, be held to violate 18 U.S.C. §1954?

Whether the construction of 18 U.S.C. §1954 by the Court of Appeals impermissibly eliminates an essential element of the statute, thereby impermissibly lessening the prosecution's burden of proof; and if not, whether that court's construction of 18 U.S.C. §1954 approves the retroactive application of a new and expansive interpretation of a criminal statute in violation of the Due Process Clause of the Fifth Amendment?

A.2. Whether apparent or ostensible power to influence the investment of pension fund assets, based upon a false claim of such capacity, is a sufficient basis for conviction under 18 U.S.C. §1954, where neither actual capacity to influence nor an intent to exercise such influence has been shown to exist?

B. Whether the preliminary proof requirements established below for an evidentiary hearing on the Government's loss or destruction of relevant, discoverable evidence are so unreasonably stringent as to wholly undermine and virtually eliminate the due process duty of the Government to preserve such evidence?

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[1] *Parties.* Petitioner's son, David Friedland, a co-defendant at trial, was also a party as a co-appellant in the consolidated appeals before the United States Court of Appeals for the Third Circuit below. David Friedland is filing a separate Petition for Writ of Certiorari.

C. Whether, in reviewing the inadvertent and erroneous submission to the jury of prejudicial material not in evidence, the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967) should be applied, rather than the plain error standard applied by the Court of Appeals in disregard of its own prior binding precedent, and in disregard of decisions in other Circuits?

D. Whether, in a prosecution for obstruction of justice by solicitation of false testimony from a Grand Jury witness in violation of 18 U.S.C. §1503, the Fifth and Sixth Amendments require that the indictment specify the subject matter of the testimony and the false statements allegedly solicited?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Jacob Friedland respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction of petitioner entered in the District Court in this case.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit is reported at 660 F.2d 919. It is reproduced in Appendix A (1a-27a) to this Petition. The opinion of the District Court pertaining to question B. presented by this Petition has not been officially reported, but is reproduced in Appendix D (32a-45a).

Jurisdiction

The opinion of the Court of Appeals for the Third Circuit was filed and judgment was entered on October 1, 1981 (App. B, *infra,* 28a-29a). On October 13, 1981, the Court of Appeals granted petitioner's motion for enlargement of time to file a petition for a rehearing and suggestion for a rehearing in banc. On November 10, 1981, the Court of Appeals denied the petition for a rehearing (App. C, *infra,* 30a-31a). On January 7, 1982, Mr. Justice Brennan extended the time for filing a Petition for a Writ of Certiorari to and including February 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. 18 U.S.C. §1954 provides in relevant part:

> Whoever being—
>
> (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
>
> (2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or
>
> (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

> (4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan
>
> receives or agrees to receive or solicit any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

3. 18 U.S.C. §1503 provides in relevant part:

> Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Statement of the Case

Petitioner Jacob Friedland, now 82 years old, was indicted along with his son, David Friedland, and charged with one count of conspiracy to solicit and receive kickbacks, in violation of 18 U.S.C. §1954 and 18 U.S.C. §371; two counts of soliciting and receiving kickbacks, 18 U.S.C. §1954; one count of traveling and causing to travel with intent to promote and facilitate bribery, 18 U.S.C. §1952; two counts of filing false income tax statements, one relating to the year of alleged receipt of the kickbacks, 26 U.S.C. §7206(1);[2] and one count of endeavoring to obstruct justice, 18 U.S.C. §1503. At all times relevant to

[2] The other count alleged a failure to report interest on a foreign bank account.

the indictment petitioner and his son were general counsel to the Mid-Jersey Trucking Industry Local 701 Pension Fund (hereinafter "the Fund").

The gist of the charges centered around two alleged violations of the offense created by 18 U.S.C. §1954. It was alleged that petitioner and his son had solicited and received two kickbacks from one Barry Marlin in exchange for two loans by the Fund to two corporations controlled by Marlin. One violation consisted of the alleged receipt of a $315,000 payment during April 1975 in Freeport, Bahamas, in exchange for a $3.5 million loan, and the other consisted of an alleged payment of $45,000 in December, 1975 in exchange for a $500,000 loan.

Following a jury trial, petitioner was convicted on all counts.[3] He was sentenced to an aggregate term of two years and a fine of $35,000.

Marlin was the Government's chief witness at trial. The trial court characterized Marlin as, among other things, a "gargantuan thief", who was an unsavory character and was unworthy of belief (App. A, *infra*, 26a-27a). Further, according to the trial court, conviction on all charges except the obstruction of justice count was dependent upon a belief in Marlin's uncorroborated testimony on essential elements of each of the offenses charged (6/5/80, Tr. 65-66, 71).[4] The dependence of the verdict upon this questionable evidentiary basis was noted by Circuit Judge Adams, in his concurring opinion, to be one of "sev-

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[3] The jurisdiction of the District Court was premised on 18 U.S.C. §3231.

[4] Transcript of the motion for a new trial held on June 5, 1980. When not preceded by a date, "Tr." will refer to the transcript of the trial proceedings, which have been consecutively numbered.

eral troubling aspects" presented by the case (App. A, *infra,* 27a). Judge Adams noted that this might properly have been a basis for a District Court decision granting petitioner's motion for a new trial. (*Id.*).

A. Construction of 18 U.S.C. §1954.

Each of the counts alleging a violation of 18 U.S.C. §1954 charged that petitioner and his son solicited and received the specified payments from Barry Marlin "because of and with intent to be influenced with respect to their actions, decisions and duties relating to questions and matters concerning the investment of the assets of the Pension Fund, to wit, . . ." the granting of each of the loans by the Pension Fund to Marlin's corporations. Prior to trial petitioner moved unsuccessfully for dismissal of these counts on the ground that each failed to charge an essential element of the offense by failing to allege any duty, decision, or action by petitioner as the basis for the payment of the kickbacks.

If believed, the evidence during the Government's case at trial established following. Petitioner and his son were general counsel for the Fund during the period in question. They represented to Barry Marlin that for a fee they could arrange the loans in question. The two payments in question were paid by Marlin and received by petitioner and his son. Both of the loans were subsequently approved by the Fund's independent investment manager, and the proceeds of the loans were issued to Marlin's companies.

The evidence at trial also established the following. The duties of petitioner's law firm to the Fund were specifically restricted to attending Fund meetings, taking and preparing minutes of those meetings, and rendering such

legal advice as the trustees of the Fund might request. Not only did petitioner and his son have no duties with regard to investment and distribution of fund assets, but the trustees themselves had delegated the duties and responsibilities for investment of the Fund's assets to an independent investment management firm.

At the time in question, management of the Fund's assets had been delegated to the Unicorn Group, which had total and absolute discretion in the investment of those assets pursuant to the delegation (Tr. 2553).[5] Neither petitioner nor his son had any duties or functions with regard to the investment of assets of the Fund (Tr. 2556; Tr. 2621-2622). As the investment manager, Unicorn had its own counsel, which had responsibility for all legal advice concerning investment of fund assets, including the loans charged in the indictment (Tr. 2582).

The uncontradicted testimony of Stone Douglass, a principal in the Unicorn Group at the time in question, was that neither petitioner nor his son, nor anyone else connected with the Fund, influenced or attempted to influence any member of the Unicorn Group in granting the two loans in question (Tr. 2580-2581). Douglass further testified that the loan in question was a good investment for the Fund at the time in question, and was granted solely on the basis of the minimal risk involved and the substantial return to the Fund (Tr. 2571; Tr. 2656-2657).

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[5] The only power retained by the trustees with respect to investments of fund assets was the limited power to direct the investment manager in writing to invest the assets of the fund in a particular investment or investments, and in that case to hold harmless the investment manager from all liability. This power was never exercised during the period in question.

There was no evidence at trial that petitioner or his son took any action or made any decision or exercised any influence over the granting of the particular loans in question, and in return for the alleged kickback. Nor was there any evidence that petitioner or his son had any legal duties or powers with respect to the investment or distribution of pension fund assets. Nor was there any evidence at trial that petitioner or his son had even a demonstrated capacity to control or influence, directly or indirectly, the investment or distribution of fund assets, including the loans in question.[6]

Among the jury charges requested by defense counsel was an instruction that a necessary element of the offense was a finding that petitioner either took some action, made some decision, or had some other duty with respect to the loans made by the pension fund. Counsel contended that mere receipt of the payments, and the fact of petitioner's position as counsel, were insufficient. It was contended

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[6] During the conference held pursuant to *Fed. R. Crim. P.* 30, regarding the prospective charge to the jury, the trial court stated:

> Now I'll state rather clearly what I think is the case.
>
> There is no evidence in my judgment that would permit the inference that the Friedlands, either one of them, brought to bear any influence on the trustees or on the members of the Unicorn Group to bring about the granting of this loan. (4/7/80, Tr. 14-15).

During argument on the motion for a new trial, the trial judge observed, even more clearly:

> I don't know what's coming in these cases when the indictment is brought. The indictment would lead you to believe that the Friedlands did, in fact, have some duty vis-a-vis their position as counsel to the fund with respect to loans, and that they did something to facilitate the granting of this loan. It turns out not to be so (6/5/80, Tr. 48).

that the statute required, as a necessary element of proof, that the actor be shown to have at least the duty, power or capacity to effectuate whatever the objective was of the kickback or payment. Counsel further specifically requested, as to the "because of" prong of the statute, that the court instruct the jury that for conviction under that prong, the actor must be proven to have done something, made some decision, or exercised some duty, in return for which the payment was being made. These requests to charge were denied.[7] These same arguments concerning the

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[7] The trial court charged the jury that it could convict for a violation of §1954 if it found that petitioner had received the kickback from Marlin either "because of" or "with intent to be influenced with respect to", any of petitioner's "actions, decisions, or other duties relating to any question or matter concerning" the fund, that is, either of the loans to Marlin's corporations. (4/9/80, Tr.25-26). With regard to the "with intent to be influenced" prong of the statute, the court charged:

> In order to find that the money was received by the defendants with intent to influence their actions, the evidence need not establish that the defendants had the actual formal legal power to effect or secure the placing of the loan to either Dunhill Brown Corporation or Dunhill Brown Shippers. It is sufficient that the defendants received the money with intent to influence any action concerning the loans made by the pension fund, regardless of whether or not that action was the exercise of formal legal power or the exercise of influence.

With regard to the "because of" prong of the statute, the court charged:

> Furthermore, you need not find that defendants actually influenced the granting of the loans to find they received a cash payment because of his actions, decisions, and duties relating to the loans, so long as such influence was the stated purpose in receiving the cash payments.

(4/9/80, Tr. 26-27).

defects in the charge on 18 U.S.C. §1954 were raised by counsel for petitioner on the motion for a new trial (6/5/80, Tr. 28-57; Tr. 207-210).

In the Court of Appeals, petitioner contended that his conviction under §1954 must be reversed because the Government failed to prove, and the trial court failed to charge the jury with respect to, an essential element of the offense: an act, a decision, or a duty concerning, or minimally a demonstrated capacity or ability to actually influence, the investment or distribution of fund assets. This argument was premised upon the statutory language requiring that the thing of value solicited or received by the actor be related to (because of or with intent to be influenced with respect to) "any of his actions, decisions or other duties" concerning the plan. The court rejected this contention, and held that such capacity was automatically established by petitioner's status as counsel to the Fund, one of the four predicate classes specified in the statute:

> Appellants' status as counsel to the fund is sufficient to place them in the class of those persons capable of violating either prong of §1954 simply by soliciting or accepting payment (a) by virtue of their status as counsel, under the "because of" prong, or (b) with an improper purpose, under the "intent" prong. Therefore, the failure to instruct the jury to make a specific finding of "capacity" was not error. (App. A, *infra*, 12a-13a).[8]

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[8] Petitioner also contended that the convictions under §1954 must be reversed because the trial court erroneously instructed the jury that, under the "because of" prong of the statute, an action, decision or fulfillment of a duty need not have been proven, and

(Footnote continued on following page)

B. Denial of an evidentiary hearing on the loss or destruction by the Government of relevant evidence.

Prior to trial, petitioner moved for dismissal of the indictment on the ground that the Government negligently lost, destroyed, or allowed the loss or destruction of, relevant discoverable evidence. Petitioner moved alternatively for an evidentiary hearing on the issue. The lost or destroyed evidence which was the subject of petitioner's motion consisted of two types: one was the personal financial and business records of Barry Marlin, and the other consisted of records of the First Kensington Bank of the Cayman Islands, which had been obtained by the Government.

In support of the motion with respect to the first category of evidence, petitioner's proffer concerning the existence and the loss or destruction of the evidence consisted of both direct and circumstantial proof. The circumstantial indications included the existence of empty file folders with labels as to the previous contents, substantial gaps in consecutively and numerically ordered files and documents, and the strangely coincidental absence of documents, notes and memoranda regarding subjects at the heart of the prosecution of petitioner from the files of one with a virtual mania for keeping records (1/28/80, Tr. 42-45). Among the direct evidence proffered was the statement by a secretary employed by Barry Marlin's brother during the time in question, that certain records she had created,

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(Footnote continued from preceding page)

that it was sufficient for conviction under *this* prong, if the exercise of influence was the stated purpose in receiving the cash payments. The court rejected petitioner's contention. It again relied on petitioner's status as counsel to the fund, and held it sufficient for conviction under this part of the statute that payment was received because of that status, and the ostensible power to exercise influence which it implied. (App. A, *infra*, 13a-15a).

and which were relevant to the instant prosecution, had been given to a Government agent, and reviewed with her, and that such documents were now nowhere to be found. Other direct evidence included Marlin's statements to close associates that his records had been "sanitized". There was also the sworn declaration of one Doreen B. Wolf, a legal worker charged with taking inventory of the Marlin records in connection with pending bankruptcy proceedings, to the effect that she had witnessed Marlin's secretary remove a bag full of documents from the record room and subsequently return the bag thereto (Certification of counsel submitted in support of motion; App. D, *infra*, 37a, 38a & n.6, 39a).

As to the first category of missing evidence, petitioner contended that the records and documents would have had a direct bearing on Marlin's credibility, and would have been relevant, substantive evidence regarding the charges at trial (1/28/80, Tr. 39-44). The records and documents would have traced the loan money at issue in this case, and even more importantly, the money allegedly paid as kickbacks could have been shown never to have really diminished Marlin's assets, but instead, to have remained in his account (1/20/80, Tr. 42-43).

The second category of evidence which was the subject of petitioner's motion primarily concerned the records of the First Kensington Bank of the Cayman Islands. As part of an investigation of Barry Marlin which led to his federal prosecution in California in 1977, postal inspector Herman Almond had obtained all of the records of the First Kensington Bank, pertinent to the transactions in issue in the petitioner's case, from the liquidator of the First Kensington Bank (Tr. 2315, 2319). Petitioner had attempted to obtain the same records from the appropriate parties in the Cayman Islands, but had been unable to do

so because of the bank secrecy laws obtaining therein (Tr. 2308).

Neither the existence nor the destruction of these records by the Government while in its custody and control was ever really in dispute. In the course of proceedings on the motion, the Government conceded that the bank documents at issue had been destroyed, allegedly routinely, by postal inspector Almond shortly after Marlin's sentencing upon his pleas of guilty in April, 1978. Contrary to an indication in the trial court's opinion (App. D, *infra*, 42a & n.11), copies of bank records in possession of the special counsel to the Local 701 Pension Fund, of which petitioner was informed by the Government, did not constitute all or even most of the bank records which had been destroyed by postal inspector Almond.

As part of the pretrial proffer concerning the relevance of the Cayman bank records, petitioner stated that the documents could demonstrate how Marlin had misappropriated most, if not all of the $3.5 million loan to his corporation from the Fund. Petitioner also asserted that the records could demonstrate that the alleged kickbacks from petitioner and his son were in fact recorded as still part of Marlin's accounts in the First Kensington Bank. This proffer concerning relevancy and materiality was confirmed during the course of trial. According to one of the Government's witnesses, the bank records could have a direct, exculpatory bearing on two of the tax counts at issue at trial (Tr. 2322-2323, 2331).

In a written opinion of March 25, 1980, the trial court denied the motion, refusing not only to dismiss the indictment, but also refusing to grant petitioner's request for an evidentiary hearing on the issues involved (App. D, *infra*, 32a-45a). The trial court held that petitioner had failed to establish a sufficient factual basis regarding

either the prior existence of the evidence at issue, or its relevance to the case, to warrant the evidentiary hearing requested. (*Id.*). As to the second category of evidence, the Cayman Bank records, the existence and destruction of which had been conceded by the Government, the court simply relied upon the Government's unsworn and unsupported assertion, disputed by defense counsel, that duplicates of these records existed and were in possession of special counsel to the pension fund, and were immediately available to the defense (App. D, *infra*, 42a at n.11).

The Court of Appeals held that the denial of an evidentiary hearing was not error, because petitioner "failed to make any showing that the evidence sought ever existed or was relevant to the instant proceeding." (App. A, *infra*, 15a-16a). In so holding, the Court failed to review the actual proffer which had been made by petitioner below. Moreover, although the court acknowledged that two categories of evidence were at issue, it failed entirely to review the denial of the hearing as it applied to the loss or destruction of the second category of evidence. Not a single mention is made of petitioner's showing below with respect to the records of the First Kensington Bank, and the fact that their existence and destruction by the Government were conceded.

Circuit Judge Adams, in his concurring opinion, referred to this issue as one of the "several troubling aspects" presented by the case. Although being unable to conclude that reversal was required, Judge Adams stated: ". . . there appears to be a serious question whether a hearing should have been conducted to determine if some of the documentary evidence had been tampered with in an impermissible manner." (App. A, *infra*, 27a).

C. Standard of review of jury's consideration of material not in evidence.

During trial, the Government sought to introduce evidence of excess expenditures by petitioner and his son to show that they spent more than their income during the two years which were the subject of the tax counts (Tr. 1850-1853; Tr. 1872. The trial court reserved ruling on the admissibility of such evidence until nearly the end of the Government's case. Prior to the court's ruling, the Government sought to authenticate records showing the credit card purchases of petitioner and his son through the custodian of records for the American Express Company (Tr. 1850). A determination concerning the admissibility of the records, however, was to await further briefing on the excess expenditure issue, and the court's ruling thereon (Tr. 1852).

The witness identified two of the documents, marked as Government exhibits 77A and 77C, as copies of his company's records of credit card transactions billed to the law firm of petitioner and his son during certain periods (Tr. 1857-1861). Each of these exhibits contained copies of several credit card receipts, with each receipt reflecting a separate transaction at a given time and in a given place.

At the conclusion of defense counsel's *voir dire* examination of the witness regarding authentication, counsel indicated that he had no objection to the documents, and the Court indicated that they should be marked into evidence. Following the *voir dire*, the prosecutor sought to question the witness regarding the identity of two particular charges contained on the exhibits, and defense counsel objected on the grounds of relevancy and the court's prior indication that the substance of the particular records would not be adduced until the court had

made a ruling on the excess expenditure issue (Tr. 1865-1872). Defense counsel indicated that he did not object to the two particular charge slips contained among the others on the exhibits, which established the presence of petitioner's son in Switzerland and the Bahamas on critical dates. He did object to testimony concerning any other charges, since their only relevance would be on the issue of excess expenditures, which the court had yet to decide (Tr. 1867-1869). During this colloquy, the trial court made clear that it had not admitted the exhibits fully into evidence, but had only admitted them for purposes of authenticity, and conditionally on its subsequent ruling on the excess expenditure evidence (Tr. 1874). The court also stated that the two particular charges, or relevant portions thereof, could be read or passed to the jury (Tr. 1565-1866).

On the following day, the trial court excluded, as more prejudicial than probative, evidence of excess expenditures (Tr. 2263-2295). Although no specific reference was made to G77A or G77C, the court's exclusionary ruling clearly applied to all but the two particular charges relevant to location. As noted by the trial court in ruling on the motion for a new trial, all except two of the charge receipts contained on the exhibits were not established to be relevant, and were arguably excluded by its subsequent ruling regarding the inadmissibility of excess expenditure evidence (6/5/80, Tr. 216-219).

Despite prior review by both counsel and the court of all exhibits, the two exhibits in question were inadvertently sent to the jury without a redaction of what should have been the excluded portions thereof. As conceded by the trial court, "It was a mistake." (6/5/80, Tr. 110).

Petitioner proffered as one ground of his motion for a new trial that the jury's verdict was tainted by the presence in the jury room of those portions of the two exhibits which had not been properly admitted into evidence. The trial court denied the motion on the ground that petitioner had not been prejudiced thereby, because the charges not in evidence were not large enough to prejudice the jury's consideration of the evidence.

In reviewing this issue, the Court of Appeals applied the "plain error" standard, stating: "If the exhibits were not intended by the court or the parties to remain in evidence, or were not actually admitted into evidence, appellants cannot now object to their presence in the jury room unless they can show that the court committed 'plain error.' Fed. R. Crim. P. 52(b)." (App. A, *infra*, 18a). The Court concluded that the trial court had not committed "plain error" in finding that the presence of the exhibits in the jury room did not prejudice the appellants (App. A, *infra*, 19a).

D. Sufficiency of the obstruction of justice (18 U.S.C. §1503) count of the indictment.

Count V of the indictment charged petitioner with obstruction of justice by solicitation of false testimony from a Grand Jury witness in violation of 18 U.S.C. §1503. The count failed to specify either the subject matter of the testimony or the specific false statements solicited. Petitioner's pretrial and post-trial motions challenging the count as defective and insufficient were denied by the trial court (App. A, *infra*, 11a). The Court of Appeals affirmed, and held that Count V adequately charged the offense. (*Id.* at 21a-22a & n.10).

Reasons for Granting the Petition

A. Construction of 18 U.S.C. §1954.

The court's construction of 18 U.S.C. §1954 presents an important question of federal statutory law which has not been, but should be, settled by this Court. The Court of Appeals construed the statute in such a way as to conflict with decisions of this Court on fundamental due process requirements for criminal prosecutions and the construction of criminal statutes. The court's decision is also in conflict with decisions of this Court and decisions of other Courts of Appeals which construe analogous statutes.

18 U.S.C. §1954 was added as part of the 1962 amendments to the Welfare and Pension Plans Disclosure Act. Although prosecutions pursuant to this statute are by no means infrequent, no prior decision has considered the question here at issue. Perhaps that is because no prosecution pursuant to §1954 has ever been premised upon such a tenuous basis as the instant one.

Prior to the Third Circuit's recent decision in *United States* v. *Palmeri*, 630 F.2d 192 (3d Cir. 1980), *cert.* den., —— U.S. ——, 101 S.Ct. 1484 (1981), and its opinion in the instant matter, all prior constructions of §1954 involved the question of whether the actor fell within one of the four predicate classes defined in the statute.[9] *Palmeri* and this case are the only ones in which the meaning of the statutory language—"any of his actions, decisions, or other duties relating to any question or matter concern-

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[9] *See, e.g., United States* v. *Russo*, 442 F.2d 498 (2d Cir. 1971), *cert. den.*, 404 U.S. 1023 (1972); *United States* v. *Marroso*, 250 F.Supp. 27 (E.D. Mich. 1966).

ing such plan"—have been placed in issue. The instant case involves the first reported instance in which the statute has been applied to an actor who receives payment, and is within one of the four predicate classes, but who takes no action, makes no decision, has no duty, and has no proven, demonstrated capacity to influence, the alleged question or matter concerning the plan. In all prior applications of the statute, including *Palmeri,* the defendant was unquestionably proven either to have had a duty with respect to distribution of fund assets, or to have taken some action, whether authorized or unauthorized, or to have exercised *de facto* influence, with respect to the distribution of fund assets.[10]

According to the court's decision in the instant matter, neither an act, decision or established duty with respect to fund assets is necessary under the statute. Nor is it even necessary, as would have seemed clearly required by the decision in *Palmeri,* that the actor have an actual capacity or ability to influence decisions regarding fund assets. It is sufficient, according to the court's decision, that the actor have merely an apparent or ostensible power to influence, even if the evidence indicates that this capacity or power does not in fact exist. Moreover, this ostensible power is automatically established by proof that the actor falls within one of the four predicate classes specified in the statute.

As a result of this construction, the court has effectively excised the language of the statute requiring that the payment be solicited or received in relation to the defendant's "actions, decisions, or other duties" pertaining to

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[10] *See, e.g., United States* v. *Palmeri, supra; United States* v. *Russo, supra.* See also, *United States* v. *Dorfman,* 470 F.2d 246, 248-249 (2d Cir. 1972), *cert.* dismissed, 411 U.S. 923 (1973).

any matter concerning the plan. Clearly, had Congress intended that the four predicate classes would automatically establish this latter element, the noted language would have been unnecessary to include in the statute. In so construing the statute, the court has violated the rudimentary tenet of construction that a statute should not be construed to make it redundant of itself. *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *Jarecki* v. *G.E. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

Even more fundamentally, the court's construction has the effect of eliminating a necessary and constituent element of proof which the statutory language indicates is required. The statute does not refer to ostensible or apparent "actions, decisions, or other duties", and nothing in the statute indicates that this language is to be read other than with its plain meaning, as requiring an actual and in-fact act, decision or other duty as the basis for receipt of the payment.

By approving the trial court's instructions to the jury, and by reading the statute so as to eliminate this element, the court has violated the most rudimentary requirements of due process. It is axiomatic that the Due Process Clause protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979). It is equally elemental that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

In effectively eliminating the noted element from a §1954 offense, the decision below conflicts with the decisions of this Court and other Circuit Courts of Appeals

which have construed analogous statutes with not dissimilar structures to that of 18 U.S.C. §1954. For example, 18 U.S.C. §201(g) proscribes the receipt by a public official of anything of value for or because of "an official act performed or to be performed by him." In construing this statute, no court has ever held or intimated that any act taken by one falling within the definition of a public official constitutes an official act for purposes of conviction; rather, the courts have meticulously required that the act taken by one proven to be a public official be shown to be such as to fall within the statutory requirement and definition of an "official act". *See, e.g., United States* v. *Birdsall,* 233 U.S. 233 (1914) (construing the antecedents of §201); *United States* v. *Muntain,* 610 F.2d 964, 967-969 (D.C. Cir. 1979); *United States* v. *Carson,* 464 F.2d 424 (2d Cir. 1972); *United States* v. *Evans,* 572 F.2d 455 (5th Cir. 1978); *United States* v. *Arroyo,* 581 F.2d 649 (7th Cir. 1978); *United States* v. *Alessio,* 528 F.2d 1079 (9th Cir. 1976). See also *United States* v. *Porter,* 591 F. 2d 1048 (5th Cir. 1979) (construing 42 U.S.C. §1395 2nn (b)(1)).

Even if not deemed a separate element requiring proof beyond a reasonable doubt, a fair reading of the language which has been effectively excised would lead a reasonable person to believe that the statute would not be violated unless receipt of the payment was related to acts, duties or influence which in fact existed. By holding that no such requirement is contained in the statute, as would be indicated by its language, the Court of Appeals has applied a new, and unexpected expansive interpretation of the statute after the fact to affirm a criminal conviction. Such unforeseeable expansion by judicial construction of a statute to include a defendant's conduct after the fact violates fundamental notions of due process. See *Marks* v. *United States,* 430 U.S. 188 (1977); *Rabe* v.

Washington, 405 U.S. 313 (1972); *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964).[11]

The instant Petition should be granted so that this Court can review and correct the highly questionable construction of 18 U.S.C. §1954 contained in the decision of the Court of Appeals below.

B. The preliminary showing required in order to obtain an evidentiary hearing on the loss or destruction by the Government of relevant evidence.

Despite the petitioner's substantial proffer regarding the prior existence, nature and relevance of evidence lost or destroyed by the Government, the Court of Appeals held that the denial of an evidentiary hearing on the issue was not error because the preliminary showing was insufficient to establish that the evidence sought ever existed or was relevant to the trial. In so ruling, the court decided an important question of constitutional dimension, regarding the prosecutor's due process duty to preserve

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[11] In *Bouie* the Court stated:

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from the unforeseeable and retroactive judicial expansion of narrow and precise statutory language. . . . [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, §10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a state Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

378 U.S. at 353-354.

evidence, which has not been but should be decided by this Court. Moreover, the standard applied by the court undermines the very purpose of the preservation requirement, and is contrary to the standard that has been established by practice in other Circuits.

It is now firmly established that due process imposes an obligation on the prosecution to disclose favorable evidence to the defense. *United States* v. *Agurs*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83 (1963). See also *Giglio* v. *United States*, 405 U.S. 150 (1972). As a necessary concomitant to this duty of disclosure, most Circuits have recognized a due process duty of the prosecution to preserve relevant evidence which might be favorable to the accused. *See, e.g., United States* v. *Bryant*, 142 U.S. App. D.C. 132, 439 F.2d 642 (D.C. Cir. 1971); *United States* v. *Arra*, 630 F.2d 836 (1st Cir. 1980); *United States* v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975), *cert.* den. 429 U.S. 821 (1976); *Government of the Virgin Islands* v. *Testamark*, 570 F.2d 1162 (3d Cir. 1978); *Armstrong* v. *Collier*, 536 F.2d 72 (5th Cir. 1976); *United States* v. *Rose*, 590 F.2d 232 (7th Cir. 1978); *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Higginbotham*, 539 F.2d 17 (9th Cir. 1976); *Taylor* v. *Lane*, 470 F.Supp. 883 (E.D. Tenn. 1978).

This Court has never squarely decided issues concerning the existence, nature or limitations of the prosecution's due process duty to preserve evidence. See *United States* v. *Augenblick*, 393 U.S. 348, 355-356 (1968) (in *dicta*, indicating approval for the proposition that where discoverable evidence is allegedly lost by the Government, the burden of producing that evidence or explaining why it could not do so is upon the prosecution). In light of its fundamental nature, and the widespread recognition of the due process duty of preservation, the importance

of the question presented cannot be doubted. The frequency with which issues involving the duty of preservation arise requires that this Court provide guidance on the mechanics and implementation of the duty. Such guidance would include resolution of the question presented herein—the quantum of preliminary showing regarding the prior existence and nature of allegedly lost or destroyed evidence which is required before a defendant is entitled to a hearing on the issue.

The standard applied by the Court of Appeals is also contrary to the standard that has been established by practice in other Circuits. *Compare, United States* v. *Butler,* 499 F.2d 1006 (D.C. Cir. 1974); *United States* v. *Lieberman,* 608 F.2d 899 (1st Cir. 1979), *cert.* den., 444 U.S. 1018 (1980). Review by this Court is also necessary to resolve this apparent but unacknowledged conflict between the Circuits on the issue.

C. Standard of review of jury's consideration of material not in evidence.

In reviewing petitioner's claim that prejudicial material, not admitted into evidence, inadvertently had been submitted to the jury and was present in the jury room during deliberations, the Court of Appeals applied the plain error standard of review. In so ruling, the court's decision is in conflict with decisions in most other Circuits as to the appropriate reviewing standard in this situation. The decision below is also inconsistent with the federal harmless error rule for review of constitutional errors established by this Court in *Chapman* v. *California,* 386 U.S. 18 (1967). In addition to the necessity to resolve these conflicts, review by this Court is warranted because the appropriate standard of review ap-

plicable in this frequently occurring situation is an important question of federal law which should be settled by the Court.

Where prejudicial material not in evidence reaches the jury, whether through the inadvertence of counsel, or the court and its representatives, it is generally settled that a new trial is required if there exists a possibility that the material influenced the verdict. The test has been variously phrased. The Second, Tenth and District of Columbia Circuits adhere to the view that if there is the "slightest possibility" that harm could result, then reversal is required. *United States* v. *Marks*, 485 F.2d 1179, 1184 (10th Cir. 1973), *cert.* den., 416 U.S. 986 (1974); *Dallago* v. *United States*, 138 U.S. App. D.C. 276, 290, 427 F.2d 546, 560 (D.C. Cir. 1969); *United States* v. *Adams*, 385 F.2d 548, 550-551 (2d Cir. 1967). *But see United States* v. *Camporeale*, 515 F.2d 184, 188 (2d Cir. 1975). The Seventh and Eighth Circuits have stated that it is sufficient to require reversal if the error "might have operated to the substantial injury of the defendant." *Osborne* v. *United States*, 351 F.2d 111, 119 (8th Cir. 1965); *United States* v. *Grady*, 185 F.2d 273, 275 (7th Cir. 1950). The Fifth and Ninth Circuits have established that if there is a "reasonable possibility" that the error affected or prejudiced the verdict, then reversal is required. *United States* v. *Howard*, 605 F.2d 865, 866 (5th Cir. 1975); *United States* v. *Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979).

Until the instant case, the Third Circuit applied a standard which required reversal if the material not in evidence "might have been influential" in the jury's determination. *United States* v. *Brandenburg*, 155 F.2d 110, 113 (3d Cir. 1946). *Brandenburg* involved a situation strikingly similar to the instant one where, through inadvertence of both counsel and the court, exhibits containing matter not

in evidence were submitted to the jury. Although it was relied upon by petitioner, the *Brandenburg* case was not even mentioned by the court below.

Each on these standards, although variously stated, turns of the existence of a mere possibility of influence of the material on the verdict. Such a standard is required because the actual impact upon the jury of such evidence cannot be accurately measured or ascertained. *United States* v. *Vasquez, supra,* 597 F.2d at 193. Moreover, each of the standards is effectively equivalent to the harmless error rule established by this Court for review of constitutional errors in *Chapman* v. *California, supra.* See 386 U.S. at 24.

When material not in evidence reaches the jury, fundamental rights of the accused, including the rights to trial by an impartial jury, to confrontation, and to cross-examination of adverse witnesses, are implicated. *Parker* v. *Gladden,* 385 U.S. 363, 364-365 (1966); *Turner* v. *Louisiana,* 379 U.S. 466, 472-473 (1965); *Virgin Islands* v. *Gereau,* 523 F.2d 140, 150-151 (3d Cir. 1975), *cert.* den., 424 U.S. 917 (1976). Therefore, application of the *Chapman* standard, or one of the other standards as articulated in the various decisions of the Circuits, is particularly appropriate for review of this kind of error to determine whether reversal is warranted.

The "plain error" rule contained in *Fed. R. Crim. P.* 52(b) is ambiguous as to whether it specifies a standard of prejudice which must be met before an unobjected to claim of error will be reviewed at all, or whether it specifies a heightened degree of prejudice which is required before an unobjected to error will be deemed to require reversal. *See* 8B *Moore's Federal Practice—Criminal Rules,* §52.02[2]; *United States* v. *Lopez,* 575 F.2d 681 (9th Cir. 1978). From a reading of the opinion below, it is

unclear in which of these ways the Court of Appeals applied the plain error rule (App. A, *infra,* 17a-19a). It is, however, clear that the court applied a more stringent standard of review either than that applied in the other Circuits in the above-noted cases, or than that pronounced in *Chapman* v. *United States, supra.*

D. Sufficiency of the obstruction of justice (18 U.S.C. §1503) count of the indictment.

Review should be granted because the ruling of the Court of Appeals in upholding the sufficiency of the obstruction of justice count (App. A, *infra,* 21a-22a & n. 10), conflicts with the decisions of this Court which establish requirements for the constitutional sufficiency of indictments. See *Russell* v. *United States,* 369 U.S. 749, 763-764, 768 & n.15, 770-771 (1962). See also, *Hamling* v. *United States,* 418 U.S. 87, 117-118 (1974).

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FRANKLIN M. SACHS,
Attorney for Petitioner.[12]

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[12]Application for admission to the Bar of this Court has been filed and is pending.

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2052 and 80-2053

UNITED STATES OF AMERICA

v.

FRIEDLAND, DAVID,
Appellant in No. 80-2052

UNITED STATES OF AMERICA

v.

FRIEDLAND, JACOB
Appellant in No. 80-2053

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Criminal Nos. 79-00246-01 and 79-00345-02)

Argued July 23, 1981

Before: ADAMS, HUNTER, and SLOVITER, *Circuit Judges*

Opinion filed October 1, 1981

Raymond A. Brown (Argued)
Raymond M. Brown
Brown, Brown, Furst, P.C.
Attorneys for David Friedland

Franklin M. Sachs (Argued)
Podvey & Sachs, P.C.
Attorneys for Jacob Friedland

Appendix A

Samuel A. Alito, Jr. (Argued)
Assistant United States Attorney
William W. Robertson
United States Attorney
Maryanne Trump Desmond
Attorneys for Appellee

OPINION OF THE COURT

HUNTER, *Circuit Judge*.

1. The appellants, David and Jacob Friedland, were convicted of soliciting and accepting kickbacks in their capacity as general counsel to the Teamsters' Local 701 Pension Fund in North Brunswick, New Jersey ["the Fund"], in violation of 18 U.S.C. §1954 (1976);[1] obstructing justice by soliciting another to give false testimony before the grand jury investigating the kickbacks, in violation of 18 U.S.C. §1503 (1976);[2] and filing false income tax statements for the years in which they re-

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1. 18 U.S.C. §1954 provides:

Whoever being . . . counsel . . . of any employee welfare benefit plan or employee pension benefit plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

2. 18 U.S.C. §1503 provides:

Whoever . . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

ceived the kickbacks, in violation of 26 U.S.C. §7206(1) (1976).[3]

2. This appeal raises the following issues:

a) Must appellants be shown to have duties with respect to the pension fund in order to come within the scope of 18 U.S.C. §1954? Must appellants have committed any acts in order to be found to have solicited or accepted payment "because of" their actions, decisions, or other duties relating to the Fund?

b) Did the trial court err in refusing to conduct an evidentiary hearing concerning the alleged loss or destruction of discoverable evidence by the Government?

c) Did the trial court err in allowing certain exhibits in the jury room?

Did the trial court err in finding that the Government's opening statements were not prejudicial?

Did the trial court err in permitting the introduction of evidence concerning appellants' secret Swiss bank account?

Did the trial court err in refusing to conduct an inquiry into appellants' allegation that the jury improperly considered appellants' failure to testify?

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3. 26 U.S.C. §7206(1) provides:

Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

d) Must an indictment charging a violation of 18 U.S.C. §1503 for obstruction of justice, which is based upon the solicitation of false statements, specify the false statements allegedly solicited?

e) Did the trial court err in denying appellants' motion for a new trial?

3. We have reached the following conclusions:

a) Implicit in the finding that appellants were counsel to the Fund is a finding of sufficient duties to bring them within the scope of §1954. Appellants need not have committed any acts in order to violate the "because of" provision of §1954; it is sufficient that they accepted payment with the stated purpose of exercising their influence over the Fund.

b) Appellants failed to show the existence or relevance of the documents in question; thus, an evidentiary hearing was not warranted.

c) The trial court did not err in finding that the presence of challenged exhibits in the jury room, and the Government's opening statements, did not prejudice appellants.

It was not arbitrary or irrational for the trial court to find that the probative value of the Swiss bank evidence outweighed the danger of prejudice therefrom.

The trial court did not err in finding that the inquiry requested by appellants into jury deliberations was prohibited by Fed. R. Evid. 606(b).

d) An indictment for obstruction of justice need not meet the same specificity requirements as an indictment for making false statements, even though the obstruction of justice count is based upon solicitation of false statements.

e) The trial court carefully considered all the evidence on the record before denying the motion for a new trial. We cannot say that the court abused its discretion in doing so.

4. Therefore, we affirm the judgment of the trial court in all respects.

FACTS

5. David Friedland and his father, Jacob, are attorneys who served for many years, up to and including 1976, as general counsel to the pension fund maintained by Teamsters' Local 701 of North Brunswick, New Jersey. Trial Transcript at 63. That fund was an employee benefit plan within the meaning of 18 U.S.C. §1954. In their role as counsel, the Friedlands were obligated to consult with the trustees of the Fund when requested, and were required to attend and provide advice at all trustees' meetings. Although the trustees employed an investment manager to oversee investment of the Fund's assets, the trustees retained significant authority over investments. The trustees had the responsibility for selecting the manager and for deciding, when the management contract expired, whether to continue the manager's services or to seek a replacement. The trustees also had complete discretion to direct particular investments at any time.

6. Until 1974, the Fund's investments had been managed by Lionel D. Edie & Co. Because of their dissatisfaction with the return on the Fund's investments, the trustees decided in late 1973 to seek a new investment manager. David Sack, the administrator of the Fund, was responsible for presenting potential managers to the trustees. Sack invited a few companies to two trustees' meetings, where they presented their proposals for investment of the Fund's assets. At the second of these meetings, David Friedland introduced A. Stone

Douglass, who represented Unicorn Pension Management Associates, a relatively inexperienced investment firm. Friedland stated that Douglass was an "excellent" investment counselor who had received a "fantastic" rate of return on investments he had made. Trial Transcript at 1247. David Sack had never met Douglass, nor had he invited Unicorn to make a presentation to the trustees at any meeting.

7. Soon after this meeting was held, Sack was informed that Unicorn had been selected by the trustees as the new investment manager. After Unicorn had served for some time as investment manager, A. Stone Douglass left Unicorn and formed his own firm, Douglass Embry Co. Shortly thereafter, the trustees transferred management of the Fund's investments from Unicorn to Douglass Embry Co.

8. In February 1975, the Friedlands were introduced to Barry Marlin, a California businessman, at a party given by Kate Edelman, a mutual friend. At that time, Marlin was seeking financing for one of his business ventures, Dunhill Brown Corp. To obtain financing, Marlin had arranged for a public offering of $3.5 million in Dunhill Brown debentures. When Marlin mentioned the upcoming public offering to David Friedland, Friedland replied, "I have a client that could do a loan like that if you are interested." Trial Transcript at 174.

9. Marlin initially declined Friedland's offer, but later arranged to meet with him in Kate Edelman's New York apartment in February or March of 1975 to discuss the loan. Marlin requested a $3.5 million loan for a term of four or five years at ten percent interest; Friedland would agree only to a term of one or two years at twelve percent interest. David Friedland then disclosed that the source of the loan was a pension fund for which he served as general counsel, and he stated that he would require a ten percent kickback. Marlin agreed to pay a

nine percent kickback ($315,000). Friedland insisted that Marlin pay the kickback in cash, in $100 bills, and that the money be withdrawn from sources outside the United States banking system. Marlin stated that he would use a bank under his control, the First Kensington Bank of the Cayman Islands.

10. Shortly thereafter, Marlin met with both David and his father, Jacob Friedland. After reviewing the terms of the loan, Jacob Friedland informed Marlin that the loan could be renewed every two years in exchange for an additional nine percent kickback. Jacob Friedland emphasized that the funds used to pay the kickback could not be taken from the loan proceeds, but would have to be drawn from sources outside the United States banking system.

11. After the meeting with representatives of Unicorn, Marlin expressed concern to David Friedland that Unicorn might not approve the loan to Dunhill Brown Corp. Friedland reassured Marlin, stating that "[i]f they don't give you the loan we'll take the fund away from them." Trial Transcript at 196.

12. In April 1975, David Friedland informed Marlin that the loan had been approved on the terms to which they had previously agreed. Friedland also told Marlin that the kickback would have to be paid on the same date as the closing, April 25, at a location outside the United States. Friedland suggested his condominium in Freeport, Bahamas, as a suitable site for payment of the kickback.

13. Marlin arranged to have his brother, Herbert, attend the closing of the loan in New York, on April 25, 1975. On the morning of April 25, Barry Marlin met David Friedland at Friedland's condominium in Freeport, Bahamas. After confirming that the loan proceeds had been paid, Marlin emptied his BOAC flight bag, containing the $315,000 kickback in one hundred dollar bills, onto the living room floor, where Friedland counted it.

14. In early May 1975, Marlin asked David Friedland whether the Fund could lend him an additional amount not greater than $1,000,000 so that he could open a business in New York; he added that the funds would not be needed until the end of the year. Friedland said that such a loan could be extended on the same terms as the first, provided that Marlin paid a nine percent kickback. Marlin did not actually request that the loan be made at this time.

15. In June 1975, David Friedland informed Marlin that in the future, instead of receiving a percentage of all loans arranged, he and his father wanted fifty percent of the profits of any business to which a loan was granted. David Friedland then gave Marlin what Friedland termed "information" Marlin "might need for the future." Trial Transcript at 263. Friedland revealed that he and his father had an account in the Banque de L'Indochine et de Suez, in Lausanne, Switzerland, under the code name Stephen Sagleo.[4] Friedland also gave Marlin the name, address, and phone number of the Friedlands' Swiss banker, Alain Peytral.

16. In the following months, Marlin attempted to obtain loans from the Fund for several business ventures. None of these loans was finalized. During this same period, Marlin was also seeking depositors for his First Kensington Bank, in order to improve its balance sheet.

17. On July 16, 1975, David and Jacob Friedland, who had complained of the low rate of interest paid by their Swiss bank, transferred $1,050,000 of their personal funds to the First Kensington Bank's accounts at two London banks. The First Kensington Bank used these funds to purchase certificates of deposit paying 8.5 percent interest, and then endorsed the certificates back to the Friedlands' Swiss bank, the Banque de

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1. The name "Sagleo," according to testimony, was arrived at by combining David Friedland's astrological sign, "Sagittarius," with his wife's sign, "Leo." Trial Transcript at 264.

L'Indochine et de Suez. This transaction apparently allowed the First Kensington Bank to carry the certificates on its balance sheet, and allowed the Friedlands to earn higher interest on their funds while retaining the security afforded by a Swiss bank. The Friedlands' personal funds remained on deposit at the London banks until March 19, 1976, and earned in excess of $60,000 in interest.

18. David Friedland's federal income tax return for 1975 listed adjusted gross income of $26,692 and interest income of $21. His 1976 form listed adjusted gross income of $28,134 and interest income of $0. Jacob Friedland's 1975 federal income tax return listed adjusted gross income of $42,124 and interest income of $13. His return for 1976 listed adjusted gross income of $30,623 and interest income of $14.

19. In October 1975, Marlin requested a loan for his new business in New York, according to the terms he had discussed with David Friedland in May 1975. Marlin said that he would need $500,000. The Friedlands agreed that the loan would be granted in December, in exchange for a kickback of nine percent, or $45,000. In December, Marlin gave David Friedland the $45,000 in cash on the same day the loan was scheduled to close.

20. In January 1976, Marlin's financial empire began to collapse, and he discovered that he was under investigation by the Securities Exchange Commission. At about this time, David Friedland told Kate Edelman about the kickbacks that had been received from Marlin, and expressed fear that Marlin might report the kickbacks to the authorities.

21. In May 1977, Marlin was indicted in California for fraudulent business practices. In July 1977, he was indicted on similar charges in Illinois. He pleaded guilty in both jurisdictions, and was sentenced to five years imprisonment in Illinois, and to a concurrent ten year term in California. In early May 1979, Marlin began cooperat-

ing with the government and revealing the details of his kickbacks to the Friedlands.

22. On July 4, 1979, the Friedlands met with Kate Edelman and told her that Marlin had "talked." They outlined exactly what they wanted her to tell the authorities when she was contacted. In reference to the first loan and kickback, they asked her to say that she had seen a suitcase with $750,000 cash in it, part of which Marlin was planning to take to his bank in the Cayman Islands, and part of which Marlin intended to use to buy a condominium in the Bahamas. The Friedlands offered to pay any legal expenses Edelman incurred, and discussed the possibility of obtaining transcripts of any grand jury hearings to enable Edelman to "take the onus" off Marlin resulting from any incriminating testimony given by others. Edelman was contacted by the FBI later the same day, and was served with a grand jury subpoena on the following day.

PROCEDURAL HISTORY

23. In October 1979, the Grand Jury for the District of New Jersey returned a multicount indictment charging appellants David Friedland and Jacob Friedland with one count of conspiracy to solicit and receive kickbacks, 18 U.S.C. §371 (1976); two counts of soliciting and receiving kickbacks, 18 U.S.C. §1954 (1976); one count of traveling and causing to travel with intent to promote and facilitate bribery, 18 U.S.C. §1952 (1976); and one count of endeavoring to obstruct justice, 18 U.S.C. §1503 (1976). In January 1980, the grand jury returned a superseding indictment which, in addition to the charges listed above, charged each appellant with two counts of making false income tax returns, 26 U.S.C. §7206(1) (1976).

24. Before trial, the appellants moved to dismiss Counts 2, 3, 4 and 5 of the indictment, on the ground

that, by failing to allege any duty, decision, or action on their part as the basis for the payment of the kickback. Counts 2, 3 and 4 failed to charge an essential element of the crimes. The appellants also argued that the charges in these counts, particularly the obstruction of justice charge in Count 5, were not specific enough to be met, or to prevent double jeopardy in future prosecutions. The appellants also moved pursuant to Fed. R. Crim. P. 14 to sever the income tax fraud counts from the remainder of the indictment, in order to prevent prejudice from joinder. The trial court denied these motions.

25. Following trial, the jury returned a verdict of guilty against both Jacob and David Friedland on all counts. The appellants filed a motion for a judgment of acquittal on all counts, pursuant to Fed. R. Crim. P. 29(c), and in the alternative, for a new trial pursuant to Fed. R. Crim. P. 33. The trial court denied appellants' motions.

DISCUSSIONS

Scope of 18 U.S.C. §1954

26. Appellants were convicted under 18 U.S.C. §1954, which provides in pertinent part:

> Whoever being . . . counsel . . . of any employee welfare benefit plan or employee pension benefit plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

The trial court, in his instructions to the jury, recognized that there are two prongs to §1954: one may be convict-

ed for receiving a kickback (a) "because of" or (b) "with intent to be influenced with respect to" any actions, decisions, or other duties relating to the plan involved.

27. Appellants contend that the trial court erred in failing to instruct the jury that it must find that appellants had some capacity to influence the granting of the loan. Appellants cite this court's decision in *United States v. Palmeri*, 630 F.2d 192 (3d Cir. 1980), *cert. denied*, —— U.S. ——, 101 S. Ct. 1484 (1981), in support of this proposition. They contend that *Palmeri* requires a finding that appellants had a demonstrated capacity to control or influence the issuance of loans. In so doing, appellants read too much into the *Palmeri* decision. In *Palmeri*, this court held that one could be among the class of persons whose actions are proscribed by §1954 even though one has no fiduciary relationship to the employee benefit plan. 630 F.2d at 199-200. The central issue in that case was whether one must have a capacity *directly* to influence the employee plan in order to violate §1954. *Palmeri* clearly stands for the proposition that capacity to influence *indirectly* is sufficient to support conviction under §1954.[5] The jury in the instant case found that appellants were counsel to the Fund.[6] Appellants' status as counsel to the Fund is sufficient to place them in the class of those persons capable of violating either prong of §1954 simply by soliciting or accepting payment (a) by virtue of their status as counsel, under the "because of" prong, or (b) with an improper purpose, under the "intent" prong. Therefore, the failure

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5. The *Palmeri* court stated: "The more reasonable construction of [§1954] is one that includes within the regulated class all persons who exercise control, direct or indirect, authorized or unauthorized, over the fund." 630 F.2d at 199.

6. The trial court instructed the jury that it must find that appellants were counsel to the Fund in order to render a guilty verdict under Count 3 of the indictment. Appendix at 351. Appellants were found guilty under Count 3.

to instruct the jury to make a specific finding of "capacity" was not error.

28. Appellants further contend that the trial court erred in its instructions regarding the "because of" prong, and, because the jury's guilty verdict may have rested on either prong, the verdict must be overturned. *See United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Appellants claim that the trial court erred in charging the jury:

> Furthermore, you need not find the defendants actually influenced the granting of the loans to find they received the cash payments because of his [*sic*] actions, decisions, and duties relating to the loans, so long as such influence was the stated purpose in receiving the cash payments.

Appendix at 353. Appellants argue that, in order to come under the "because of" prong, they must be shown to have actually taken some action in return for the kickback.

29. This court confronted a similar argument in *United States v. Niederberger*, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978). Niederberger was charged with receiving an illegal gratuity in violation of 18 U.S.C. §201(g), which provides:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or *because of* any official act performed or to be performed by him . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(Emphasis supplied.) We rejected Niederberger's claim that the indictment must allege some quid pro quo for the gift received. Noting that §201(c)(1) substitutes the phrase "in return for" for "because of," we stated:

> It is clear, then, that §201(c)(1) requires as one of its elements a quid pro quo. In fact, we find this to be the primary distinction between subsections (c)(1) and (g). . . .
>
> Thus, we find it unnecessary for the Government to allege in an indictment charging a §201(g) offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A quid pro quo is simply foreign to the elements of a subsection (g) offense. What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver.

580 F.2d at 68-69.

30. We find this analysis equally applicable when it is counsel to a pension fund, and not public officials, who receive what the *Niederberger* court called an "illegal gratuity." *Id.* We believe the trial court was correct in not requiring that any action actually be taken in order for the jury to find that the kickback was received "because of" actions, decisions, or other duties relating to the Fund. So long as appellants were counsel to the Fund, and received the kickback (a) because of that status, which gave them at least ostensible power to exercise influence, or (b) with the purpose of exercising the influence they either actually or ostensibly had over de-

cisions regarding the Fund, then they need not be shown to have actually exercised such influence. If actual exercise of influence were a prerequisite to a violation, then anyone who could potentially influence a future decision concerning a pension plan would be free to solicit kickbacks so long as he ultimately took no action to influence the decision. Such a construction is inconsistent with the broad purpose of §1954. *See United States v. Palmeri*, 630 F.2d 192, 199-200 (3d. Cir. 1980), *cert. denied*, —— U.S.——, 101 S. Ct. 1484 (1981).

31. When counsel to an employee pension fund take a kickback for the stated purpose of exercising their influence over the fund, then their actions come within the "because of" prong of §1954.

Denial of the Evidentiary Hearing

32. Appellants contend that the trial court erred in denying their motion for an evidentiary hearing to determine whether the government lost or destroyed certain discoverable evidence. The evidence in question falls into two categories: (1) Barry Marlin's personal financial records; and (2) the records of the First Kensington Bank of the Cayman Islands.

33. This court has held that "[l]oss or destruction of relevant evidence by the government not only raises general questions of the fundamental fairness of a criminal trial, but may also deny a defendant the right to compulsory process." *Virgin Islands v. Testamark*, 570 F.2d 1162, 1166 (3d Cir. 1978). The court below, however, found that the appellants' motion for an evidentiary hearing was unsupported by any showing that the records in question ever existed, or, if they did, that they were relevant to the instant case. The only support for the appellants' motion with respect to Marlin's personal records is the bare inference that appellants would draw from the presence of empty, labeled file folders, coupled

with Marlin's alleged "mania" for record-keeping. Appellants presented no evidence tending to show that the file folders were not empty when the government gained possession of them. Furthermore, the trial court, in its opinion in support of its denial of the motion, noted that the allegations of loss or destruction of this evidence "are little more than suppositions and speculation based entirely on hearsay statements by unidentified third parties and individuals having no personal knowledge of the alleged destruction of evidence. Significantly, no affidavits have been filed by any of these individuals to support defendants' allegations." Appendix at 105-06 (citations omitted) (footnote omitted).

34. Because appellants failed to make any showing that the evidence sought ever existed or was relevant to the instant proceeding, the trial court did not err in denying the motion for an evidentiary hearing.

Presence of Improper or Prejudicial Evidence or Statements Before the Jury; the Jury's Consideration of Appellants' Failure to Testify

35. Appellants seek review of several rulings of the trial court regarding the consideration of certain evidence or statements by the jury. Their first contention is based on a published newspaper interview with a juror. The interview, which took place after the verdict was announced, indicated that the jury had improperly considered and discussed the appellants' failure to testify.

36. The trial court refused to conduct an examination of the jurors to verify the appellants' claim. As the court found, any inquiry into the jury's deliberations would necessarily have violated Fed. R. Evid. 606(b), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's

> deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.

The inquiry requested by appellants falls squarely within the prohibition of Rule 606(b). Because "extraneous prejudicial information" or "outside influence" were not alleged by appellants, the inquiry would not have fallen within the exceptions to the rule. *See United States v. D'Angelo*, 598 F.2d 1002, 1004-05 (5th Cir. 1979). Therefore, the trial court's refusal to conduct the inquiry will be upheld.[7]

37. Appellants further argue that their convictions must be reversed because documents not admitted into evidence were sent to the jury room. The record reveals that the exhibits in question — G77A and C — had been formally and properly admitted without objection.[8]

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7. United States v. Vento, 533 F.2d 838 (3d Cir. 1976), cited by appellants, is inapposite. An inquiry was conducted in that case for the limited purpose of discovering whether, in fact, extraneous prejudicial information was improperly brought to the jury's attention. 533 F.2d at 869-70.

8. In fact, when the Government sought to continue questioning the custodian of these records, counsel for appellant Jacob Friedland stated: "Your Honor, we object. They're now in evidence. The jury can have them. They speak for themselves." Trial Transcript at 1865-66. The record also shows that the clerk announced the receipt of the exhibits in evidence. *Id.* at 1865.

These exhibits included certain financial records of the appellants.

38. Subsequent to admission of these exhibits, the trial court made a ruling excluding certain categories of evidence; the exhibits in question apparently fell into one of the excluded categories. However, no mention was made of exhibits G77A and C at the time of this ruling, and neither the Government nor the defense moved to withdraw them from the jury's consideration. Furthermore, although counsel were afforded ample opportunity to examine all evidence before it was finally submitted to the jury, no objections were made to the submission of these exhibits.[9]

39. Under Fed. R. Crim. P. 51, a party is ordinarily barred from asserting error unless the party "makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor. . . ." If the exhibits were not intended by the court or the parties to remain in evidence, or were not actually admitted into evidence, appellants cannot now object to their presence in the jury room unless they can show that the court committed "plain error." Fed. R. Crim. P. 52(b).

40. When exhibits not in evidence reach the jury, a new trial should not be ordered unless it is shown that the evidence was so prejudicial that the defendant was denied a fair trial. *United States v. Camporeale*, 515 F.2d 184, 188 (2d Cir. 1975); *see also United States v. Stoehr*, 196 F.2d 276, 283 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952). The expenditures revealed in exhibits G77A and C were inconsequential when compared with those re-

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9. In the instant case, the defense counsel were given the opportunity to examine the exhibits before the exhibits were sent to the jury room. In general, the defendant should not be allowed to speculate by letting error go unremarked while then seeking a new trial on the basis of an unfavorable verdict. 3 Wright, *Federal Practice and Procedure* (Criminal) §842, at 342 (1969).

vealed in the remainder of the evidence. We cannot say that the trial court committed "plain error" in finding that the presence of exhibits G77A and C in the jury room did not prejudice the appellants.

41. Appellants also contend that evidence showing that they had a secret Swiss bank account should not have been admitted. Appellants concede that this evidence was relevant to the tax fraud counts in the indictment; however, they argued at trial for severance of these counts because of the prejudicial effect this evidence might have with respect to the remainder of the counts.

42. The trial court denied appellants' motion for severance of the tax fraud counts. It did so because it accepted the Government's argument that the Swiss bank account evidence was relevant to the conspiracy count, Count 1. The Government contended that the appellants had discussed the bank account with Barry Marlin as part of a plan for the distribution of proceeds during future loans to be made from the pension fund. The Government further contended that the revelation of the secret account tended to show a close relationship between appellants and Marlin which supported the conspiracy charge.

43. Under Fed. R. Evid. 401, evidence concerning the appellants' disclosure of the existence of their secret Swiss bank account to Marlin was relevant to prove the conspiracy charged in Count 1. Rule 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Marlin's familiarity with the secret account supports his testimony that appellants had discussed with him their plan to use the account to effectuate future schemes in-

volving pension plan funds. It also tends to show, as the Government contended it would, a close association between appellants and Marlin which supports the conspiracy conviction.

44. Because the evidence concerning the Swiss account was relevant, the only remaining question is whether the evidence should have been excluded under Fed. R. Evid. 403, on the ground that "its probative value [was] substantially outweighed by the danger of unfair prejudice. . . ." The trial court's ruling that exclusion was not warranted should be affirmed unless it was arbitrary or irrational. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978). The record shows that the trial court carefully considered whether the evidence was sufficiently prejudicial to justify its exclusion, and that the court concluded that it was not. The court's finding was certainly not arbitrary or irrational, and therefore it must be upheld.

45. Finally, appellants contend that certain remarks made by the Government in its opening were so prejudicial as to require reversal. The Government made reference to appellants' "fleecing" of the pension fund, to appellants' "extravagant lifestyle," and to appellants' duty to protect the fund.

46. Even if these remarks are construed as inaccurate or improper, reversal is appropriate only when defendants are prejudiced by the alleged improprieties. *United States v. Somers*, 496 F.2d 723, 737 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). The trial judge is in the best position to weigh the significance of challenged statements in the context of the entire case, to assess the impact of the statements upon the jury, and to determine what remedy, if any, is appropriate. The trial court should be given broad discretion to control the opening remarks. *Cf. Herring v. New York*, 422 U.S. 853, 862 (1975) (trial court given broad discretion to control closing remarks); *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d

Cir. 1978) (same). The trial court carefully supervised all phases of the trial, including the opening; we cannot say that he abused his discretion in finding these remarks unprejudicial.

Count 5: The Obstruction of Justice Charge

47. Count 5 of the indictment charged appellants with violating 18 U.S.C. §1503, which provides in relevant part:

> Whoever . . . corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Count 5 charged that appellants

> did corruptly endeavor to influence, obstruct and impede the due administration of justice in that the defendants endeavored to cause Kate Edelman to render false and misleading testimony before a duly empanelled United States Grand Jury. . . .

Appendix at 34. Appellants urge reversal of their conviction under Count 5 on two grounds: (1) the indictment does not meet this circuit's specificity requirements in false statements cases, and (2) Kate Edelman was not a "witness" within the meaning of §1503.

48. In support of their first contention, appellants cite this court's decisions in *United States v. Slawik*, 548 F.2d 75 (3d Cir. 1977), and *United States v. Tonelli*, 577 F.2d 194 (3d Cir. 1978). Each of these cases involved a challenge to an indictment under 18 U.S.C. §1623, which provides in part:

> Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United

> States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Because materiality and falsity are expressly included as elements of an offense under §1623, this court imposed a requirement of specificity in the indictment:

> We find the same prosecutorial deficiency which undermined the *Slawik* conviction — the failure to specifically allege in the indictment the precise falsehoods charged — exists here.

Tonelli, 577 F.2d at 196.

49. Appellants contend that the same specificity requirement should be imposed on an indictment under 18 U.S.C. §1503. We cannot agree. Although the method employed by appellants in violating §1503 consisted of an attempt "to cause Kate Edelman to render false and misleading testimony," this case is not thereby transformed into a "false statements case," as appellants contend. Rather, it is an obstruction of justice case. Materiality and falsity are *not* elements of the crime charged here.

50. We conclude that an indictment under §1503 for endeavoring to obstruct justice, which is based upon an attempt to induce the rendering of false testimony, need not satisfy the specificity requirements imposed by *Slawik* and *Tonelli* for a §1623 violation.[10]

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10. Appellants also make what is essentially a variance claim. They note that, in response to an order of the trial court, the Government supplied the following as the false statements which appellants encouraged Kate Edelman to make:

> She saw a suitcase with $750,000 in it which Barry Marlin was taking to his bank in the Cayman Islands; whatever was left of the money after Marlin made a deposit, he was taking to the Bahamas to buy an apartment close to David Friedland's apartment.

Appendix at 192. At trial, the court found the evidence insufficient to sustain a §1503 conviction except as to the allegation that appel-

51. Appellants' second contention is that Kate Edelman was not a "witness" within the meaning of §1503. While this may be true, it is entirely irrelevant. Appellants were charged and convicted under a portion of §1503 which, unlike the other provisions of §1503, does not include any reference to a "witness." Rejecting a claim identical to that advanced by appellants, the court in *Falk v. United States*, 370 F.2d 472 (9th Cir. 1966), *cert. denied*, 387 U.S. 926 (1967), stated:

> [T]he defendant . . . was not charged with influencing a 'witness' within the first provision of Section 1503. [He] was charged with endeavoring to influence, obstruct or impede the due administration of justice. The means of so doing was by attempting to corruptly influence prospective witnesses. It is clear that in the mind of the defendant, they were prospective witnesses. If he had thought otherwise, there would have been no reason to ask [them] to testify falsely. So, while the term 'witness' may be a

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lants solicited the statement regarding Marlin's stated intent to buy an apartment close to David Friedland's. Thus, appellants argue, they may have been *convicted* for soliciting the statement regarding the apartment, while having been *indicted* by the grand jury for soliciting the other statements supplied by the Government.

We need not determine whether this constitutes variance to conclude that it is not, in any event, fatal variance:

> The federal courts have scrapped the old rule condemning every variance between indictment and proof, and convictions are not now set aside except for variance resulting in substantial prejudice to defendant.

Jackson v. United States, 359 F.2d 260, 263 (D.C. Cir.), *cert. denied*, 385 U.S. 877 (1966). In the instant case we can discern *no* prejudice to appellants resulting from the events they allege as variance. As explained in the text, the indictment was sufficient on its face to charge a violation of §1503. The Government, by subsequently supplying the false statements upon which the indictment was based, placed appellants on notice as to what charges they would have to defend themselves against. *See* United States v. *Izzi*, 613 F.2d 1205, 1210-11 (1st Cir.), *cert. denied*, 446 U.S. 940 (1980).

> word of art in an indictment under the first portion of Section 1503, the phrase 'prospective witnesses' is descriptive only of the intended status of [those whom the defendant attempted to influence] when the Indictment charges obstruction of justice.

370 F.2d at 476. We agree with the *Falk* court in concluding that solicitation of false testimony from a prospective witness may provide the basis for a conviction under the obstruction of justice provision of §1503. In the instant case, Kate Edelman was unquestionably a prospective witness in the minds of defendants when they asked her to testify falsely.[11] As a result, their conduct fell squarely within that portion of 18 U.S.C. §1503 under which they were charged.[12]

The Motion For A New Trial

52. After the jury verdict, appellants moved for a new trial under Fed. R. Crim. P. 33, which provides in relevant part:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice.

Appellants contend that the verdict against them is unjust because it rests upon the testimony of Barry Marlin. Because appellants believe Marlin's testimony was not credible, they contend that the trial court should have granted a new trial "in the interest of justice."

53. The denial of the motion for a new trial will be upheld so long as the trial court did not abuse its discretion or fail to exercise it. *United States v. Iannelli*, 528

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11. When appellants suggested that Edelman make the statements involved, she stated that she had not been contacted by the authorities. Appellants responded: "But you will." Trial Transcript at 1929.

12. Because we find that Edelman was a prospective witness under *Falk*, we need not confront the question whether appellants could have been convicted under the obstruction of justice provision were Edelman *not* a prospective witness.

F.2d 1290, 1292 (3d Cir. 1976). The record reveals that the trial court carefully considered the evidence in the case before reaching its conclusion. The trial court expressly recognized its power to consider the credibility of Government witnesses, specifically Marlin. Appendix at 572-75. Nevertheless, the court found Marlin sufficiently competent to allow the jury to decide whether or not he should be believed.[13] We cannot say that it was an abuse of discretion to defer to the jury in this case, in which ample evidence on the issue of Marlin's credibility was placed before the jury.[14]

54. Moreover, the record reveals that the trial court did not end its inquiry after accepting the jury's determination of Marlin's credibility. The court found significant corroborating evidence on the record.[15] In sum, the court carefully satisfied itself that, given the evidence in the record, including the credibility of witnesses, an injustice had not been committed as a result of the jury's

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13. In denying the motion for a new trial, the trial court stated: "Criminal cases, and this one is no exception, usually are fought on the battlefield of credibility. . . . A witness such as Marlin is not incompetent to be a witness." Appendix at 574.

14. Responding to a credibility challenge similar to that of appellants, the Supreme Court, in Glasser v. United States, 315 U.S. 60 (1942), stated: "The short answer to this is that the credibility of a witness is a question for the jury." *Id.* at 77.

15. In support of its denial of appellants' motion for a new trial, the trial court stated:

> . . . I must part company with the defendants when they claim that Marlin is not corroborated. . . . He was corroborated principally by the testimony of Kate Edelman, Fred Otash and Max Cohen. There is also significant corroboration contained in the great mass of documentary evidence introduced.
>
> * * *
>
> In short, although I recognize that there can be most legitimate question concerning Marlin's credibility, those questions were fully explored and presented issues for the jury. I cannot say on the record of this case that a miscarriage of justice occurred and I do not believe that judicial interference with the verdicts is warranted.

Appendix at 575-76.

verdict. We conclude that the trial court did not abuse its discretion in denying the motion for a new trial.

Barry Marlin's Credibility

55. Appellants grounded their attack in this appeal upon Marlin's lack of credibility. Appellants' briefs commence with an "Introductory Statement," quoting at length the trial court's characterization of Marlin as, among other things, a "gargantuan thief."[16] The briefs are replete with quotations in which the trial court expressed its opinion that Marlin was an unsavory character who was not believable. Apparently, the appellants would have us overturn the verdict based upon our reading of the trial court's assessment of Marlin's credibility, despite the trial court's finding that Marlin was a competent witness.[17] This we cannot do.

56. The issue of Marlin's credibility was amply tested at trial. Both judge and jury heard and saw Barry Marlin testify at great length. Marlin was subjected to vigorous cross-examination by experienced counsel. Marlin's testimony on cross-examination alone occupies over 700 pages in the record. Nevertheless, although the jury could have refused to believe Marlin's testimony, it obviously decided not to do so. And, although the trial court could have granted appellants' motion for a new trial, after a consideration of the credibility issue it decided not to do so. In this appeal, the main thrust of appellants' argument is directed against Marlin's testimony. Appellants would have us make a credibility judgment different from that made by the trial court and jury. We decline.

57. The judgment of the district court will be affirmed.

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16. Brief for Jacob Friedland at 4; incorporated by reference in Brief for David Friedland at 2.

17. *See* note 13 *supra*.

ADAMS, *Circuit Judge*, concurring.

This case presents several troubling aspects. Much of the evidence in support of the convictions here consists of testimony by Barry Marlin, a witness who the district court indicated was unworthy of belief. Prejudicial testimony regarding the existence of a Swiss bank account in the name of the Friedlands was heard by the jury despite the government's ultimate failure to connect the Swiss bank account to the transactions in question, although such connection was promised by the prosecution at the time the evidence was introduced. Either of these matters might properly have been a basis for a district court decision to grant defendants' motion for a new trial. Furthermore, there appears to be a serious question whether a hearing should have been conducted to determine if some of the documentary evidence had been tampered with in an impermissible manner. Nevertheless, the record is insufficient to support the contention that the district court's refusal to hold a hearing on the possible destruction of evidence or to grant a motion for a new trial was either an abuse of discretion or legal error. Accordingly, I concur in the result reached by the majority.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2052/3

UNITED STATES OF AMERICA,

vs.

FRIEDLAND, DAVID

Appellant in No. 80-2052,

FRIEDLAND, JACOB,

Appellant in No. 80-2053.

(D. C. Criminal No. 79-00346-01 and 02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, HUNTER and SLOVITER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on July 23, 1981.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered June 9, 1980 and July 9, 1980, be, and the same are hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

October 1, 1981

Certified as a true copy and issued in lieu of a formal mandate on November 18, 1981.

Test:

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

Denial of Petition for Rehearing by the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2052 and 80-2053

UNITED STATES OF AMERICA,
Appellee,

vs.

DAVID FRIEDLAND,
Appellant in No. 80-2052,

JACOB FRIEDLAND,
Appellant in No. 80-2053.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III,
Judge

Dated: November 10, 1981

APPENDIX D

Opinion of the United States District Court of the District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CRIMINAL NO. 79-346

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID FRIEDLAND and JACOB FRIEDLAND,
Defendants.

MEANOR, District Judge.

Defendants, David and Jacob Friedland, have moved to dismiss the indictment on the ground that the Government "negligently allowed the destruction of discoverable evidence." Specifically, defendants contend that Barry Marlin, an anticipated prosecution witness and the person from whom defendants allegedly received the "kickbacks" charged in counts 2 and 3 of the indictment in connection with loan transactions involving a pension fund of which defendants were counsel, removed potentially exculpatory material from files stored at the office of California attorney Paul Hittelman. The circumstances sur-

rounding the storage of these documents at Mr. Hittelman's office may be summarized as follows: Barry Marlin was indicted by a federal grand jury in Los Angeles on July 27, 1977 on charges of mail fraud, securities fraud and tax violations arising out of various investment schemes in which he defrauded investors of tens of millions of dollars. During the course of the investigation, the grand jury subpoenaed Marlin's personal financial and business records. Following Marlin's plea of guilty to six counts of the indictment, the presiding judge in the California proceeding[1] apparently ordered the U.S. Attorney's office for the Central District of California to turn the subpoenaed material over to Hittelman, the custodian of the records in bankruptcy proceedings involving Marlin's various business ventures. The records were to be used in civil litigation by investors defrauded by Marlin's schemes.

Following oral argument on January 28, 1980, this court denied defendants' motion for dismissal of the indictment, and ruled that defendants had failed to establish a sufficient factual basis to warrant an evidentiary hearing on the question of whether Barry Marlin had destroyed evidence relevant to the charges contained in the present indictment (Tr. of January 28, 1980 Hearing at 38/1-49/23). On February 8, 1980, defense counsel filed a "Certification" and "Supplemental Certification" which, they argue,[2] provide an adequate foundation to trigger

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[1] The Honorable A. Andrew Hauk, United States District Judge, United States District Court for the Central District of California.

[2] The Certification was filed by Franklin M. Sachs, Esq., attorney for defendant Jacob Friedland. However, the Certification was made on behalf of both defendants.

such a hearing. Following re-argument on February 27, 1980, I allowed the parties additional time to submit memoranda with respect to the issue of the "trigger date" of the Government's obligation to preserve potentially exculpatory material (Tr. of February 27, 1980 Hearing at 89/24-92/18).

It has been held that the failure of the prosecution to preserve potentially exculpatory material may, in certain circumstances, constitute grounds for dismissal of an indictment. *See United States* v. *Pollock*, 417 F.Supp. 1332 (D. Mass. 1976).[3] However, dismissal of an indictment is a severe sanction which should only be imposed where there is a bad faith destruction of evidence by the Government or a complete failure to prescribe adequate procedures to preserve potentially exculpatory material. *United States* v. *Quiovers*, 539 F.2d 744, 746-47 (D.C. Cir. 1976); *United States* v. *Pollock*, *supra*.

Perhaps the leading decision in the area of the loss, or destruction of relevant evidence is *United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971) ("*Bryant*" or "*Bryant I*"), where the Court held that the Government must make "'earnest efforts' to preserve crucial materials and to

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[3] In *Government of the Virgin Islands* v. *Testamark*, 570 F.2d 1162 (2d Cir. 1978), the Court of Appeals for the Third Circuit, in discussing the general obligation of the Government to preserve relevant evidence, stated: "Loss of destruction of relevant evidence by the government not only raises general questions of the fundamental fairness of a criminal trial, but may also deny a defendant the right to compulsory process." *Id.* at 1166.

find them once a discovery request is made." *Id.* at 651.[4] Other circuits have adopted the *Bryant* Court's holding

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[4] In *Bryant*, the Court stated that the lost evidence—a tape recording of conversations between the defendant and an undercover agent—was "absolutely crucial to the question of [the defendant's] guilt or innocence." 439 F. 2d at 648. However, the D.C. Circuit adopted a "pragmatic balancing approach" and upheld the conviction after remand. 448 F.2d 1182 (D.C. Cir. 1971) (*"Bryant II"*). The Court concluded that the strong evidence of guilt adduced at trial and the probable unintelligibility of the tape outweighed the negligence of the federal agent in losing the recording. *Id.* at 1184.

The D.C. Circuit defined the issue presented in *Bryant* as follows:

> It is important to recognize that this is not a case of good faith effort to preserve highly relevant evidence, frustrated only by inadvertent loss. Rather, it is a case of *intentional non-preservation by an investigative official.* On a spectrum between good faith but inadvertent loss and bad faith destruction, Agent Warden's conduct must lie somewhere in the middle. Perhaps it should lie somewhat closer to the latter end. For, despite the overriding vagueness of Agent Warden's testimony, *there is at the very least a hint of bad faith in the record.* A highly disturbing element of the agent's conduct is his apparent reluctance to let even the United States Attorney's office know that a tape recording had ever been made.
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> At issue, then, are the legal consequences of *intentional non-preservation* by investigative officials of *highly relevant* evidence, colored by clear reluctance even to admit that the evidence ever existed at all.

439 F.2d at 647. (Emphasis added.) However, the Court also indicated that the failure to preserve relevant evidence will not be excused merely because it results from the negligence of a Government officer. *Id.* at 651. *See also United States* v. *Augenblick,* 393 U.S. 348 (1969); *United States* v. *Quiovers,* 539 F.2d 744 (D.C. Cir. 1976) (no public policy would be served by dismissing an indictment where there is no colorable showing of prejudice to the defendant and where no officer or agent of the government has acted deliberately to disadvantage the defendant).

that the Government's failure to take measures to preserve potentially exculpatory material "may deny a defendant due process, and thereby jeopardize otherwise viable convictions." *Government of the Virgin Islands* v. *Testamark*, 570 F.2d 1162, 1165-66 (3d Cir. 1978) and cases cited therein.[5]

However, in *Bryant*, *Testamark* and the other cases cited by the defendants, the existence *vel non* of the "lost" evidence was never in dispute. Nor was the fact that the evidence was directly relevant to the guilt or innocence of the accused or a defense asserted at trial, and that the evidence had been gathered during the course of an investigation of that particular defendant. Rather, the sole issue confronting the Courts in *Bryant* and *Testamark* was

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[5] However, sanctions have rarely been imposed by these Courts. *See Government of the Virgin Islands* v. *Testamark*, 570 F.2d at 1166 n. 7. In *Testamark*, the defendant was convicted of assault with intent to rape. At trial, Testamark admitted the assault, but defended on the theory that he was so intoxicated that he was unable to form a specific intent to rape. On appeal, defendant argued, *inter alia*, that the Government had deprived him of evidence relevant to his defense of incapacity by allowing a blood sample taken shortly after his arrest to spoil. 570 F.2d at 1164.

Although the Court concluded that the police officer's actions in not refrigerating the sample constituted "gross negligence" and a deviation from departmental procedures, it refused to infer from the mere failure to preserve the evidence that the blood sample would have proved exculpatory. In addition, the Court determined that the evidence presented at trial clearly established the defendant's capacity to form an intent to rape, and held that the "failure to preserve the blood sample was harmless beyond a reasonable doubt." *Id.* at 1167. The Court noted, however: "We need not decide whether, had this error come before the trial court on a motion to suppress evidence at the opening of the trial, the harmless error doctrine would have been applicable. *Id.* n. 12.

whether the Government had made "earnest efforts" to preserve clearly relevant evidence and, if not, what sanctions, if any, should be imposed for its failure to comply with its obligations in this regard. *See also United States* v. *Quiovers,* 539 F.2d at 746-47.

In contrast, in the instant case, defendants speculate about the very existence of some of these documents. They assume that since they have been unable to locate any "notes, diaries or memoranda" concerning the loan from the Local 701 Pension Fund, Marlin must have destroyed records relating to this transaction. (February 7, 1980 Certification at ¶ 5) However, other than the bald assertion that Marlin had a "mania for keeping records," defendants offer no evidence that these documents ever existed, or that Marlin removed any such records from Hittelman's office. Indeed, in the Certification, defense counsel request the opportunity to examine Marlin not only with respect to the alleged destruction of certain records, but also as to the very existence of these documents. (February 7, 1980 Certification at ¶ 13(B))

In paragraph 4 of the Certification, defense counsel claim that the files and boxes stored in Hittelman's office were inventoried in June 1978 and that material which "may have been useful" to the defense "appears to be missing" from those files. Initially, it should be noted that there is a serious question as to whether any such material has, in fact, been removed from the office. By letter dated February 11, 1980, defense counsel informed the court that records which had previously been listed as missing have since been "found." More importantly, defendants fail to supply any evidence that Marlin removed or destroyed any of these allegedly missing documents. The representations of defense counsel are little more

than suppositions and speculation based entirely on hearsay statements by unidentified third parties (*Id.* at ¶ 11) and individuals having no personal knowledge of the alleged destruction of evidence. (*Id.* at ¶ 10) Significantly, no affidavits have been filed by any of these individuals to support defendants' allegations.[6] Moreover, it appears

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[6] Defendants have submitted a photocopy of a "Declaration" filed in the Central District of California in connection with Marlin's Rule 35 motion before Judge Hauk. The declarant, one Dorene B. Wolf, states that Marlin's secretary removed some unspecified documents from the office on April 25, 1979. However, it appears that the documents to which Ms. Wolf refers were private accounting work papers which were removed from the room for review by Mr. Hittelman in connection with the bankruptcy proceedings involving Marlin's various business ventures (Sealed Transcript of May 7, 1979 Proceedings at 71/4-12). Judge Hauk had taken Marlin's Rule 35 motion under submission and had advised Marlin that the Court would entertain a reduction of the sentence if Marlin would cooperate with civil litigants in the various bankruptcy proceedings involving partnerships which he had established as an investment counselor. Marlin had agreed to cooperate in these proceedings, and he was given access to the records stored in Hittelman's office.

During the hearing on Marlin's motion for reduction of sentence, Mr. Hittelman advised the Court that he had conducted an independent investigation of Ms. Wolf's allegations and determined that no such records were missing. (Tr. of May 7, 1979 Hearing on Motion for Reduction of Sentence at 39/4-8. *See also id.* at 37/6-40/13; February 11, 1980 Affidavit of Thomas J. Nolan, Esq. at ¶ 12.)

It should be noted that during the course of his cooperation in the civil litigation, Marlin was incarcerated and would be accompanied to Hittelman's office by U.S. Marshals. There does not appear to be any dispute that subsequent to May 7, 1979, Marlin has not removed or destroyed any records. (*See* February 12, 1980 Affidavit of Michael B. Himmel, Special Attorney, U.S. Department of Justice at ¶12; *see also* February 11, 1980 Affidavit of Thomas J. Nolan, Esq.)

that numerous attorneys, paralegals and clerks have had access to these records in connection with the civil litigation arising out of Marlin's various fraudulent schemes.[7] *See* note 6, *supra.*

There is another reason for denying the relief requested by the defendants. Defendants can only speculate on the exculpatory nature of the records which they say "appear to be missing" from Hittelman's office, and on the relevance of any such material to the offenses charged in the present indictment or the defenses which may be asserted at trial.[8] *Cf. United States* v. *Wander,* 601 F.2d 1251, 1263 (3d Cir. 1979) (regardless of whether Government made earnest efforts to preserve evidence, defendants failed to demonstrate that lost photographs and tapes were material to their guilt or innocence, or relevant to

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[7] Defendants do not contend that any of the individuals involved in the civil litigation removed or destroyed any documents. Rather, the thrust of their argument is that Marlin destroyed records which may have been useful to their defense. However, even assuming that persons associated with the civil litigation removed documents from the office at a time when the Government was under an obligation to preserve such records for the defense in the present proceeding, under the unique circumstances of this case, I do not believe that dismissal of the indictment would be required. *See United States* v. *Quiovers,* 539 F.2d at 747 (totality of circumstances surrounding loss of evidence must be examined to determine what sanctions, if any, should be applied).

[8] Defendants contend that Marlin's personal financial and business records may be used, *inter alia,* to impeach his credibility at trial. (Tr. of January 28, 1980 Hearing at 23/12-15; 39/3-10; 42/12-17) However, defendants certainly cannot claim that they have been afforded inadequate materials with which to impeach Marlin.

their defense); *United States* v. *Quiovers*, 539 F.2d 744, 748 (D.C. Cir. 1976) (failure to preserve tape recording of telephone conversation between defendant and undercover agent did not require dismissal of indictment where it was uncertain that recording even contained a reference to the transaction for which defendant was charged or that recording would have significantly assisted the defense); *Armstrong* v. *Collier*, 536 F.2d 72, 77-79 (5th Cir. 1976) (affirming denial of federal habeas relief where State made earnest efforts to preserve prosecutor's file and to locate it for use in habeas proceeding, where petitioner failed to demonstrate that anything contained in the file would have been useful to his defense at trial and where there was no allegation of bad faith on the part of the State). I recognize the logical force of the contention that it is impossible to determine the exculpatory nature of "lost" evidence without knowing the contents of the missing material. I am also mindful of the *Bryant* Court's observation that the duty of preservation extends to evidence which "might" prove "favorable" to the accused. 439 F.2d at 641, 652 n. 21. However, in *Bryant*, although there was uncertainty as to the exculpatory or inculpatory nature of the lost evidence and the probable effect that the material would have had on the jury, it was clear that the tape recording "provided direct evidence on the issue of guilt or innocence." 439 F.2d at 649 n. 12. *See id.* at 647 (evidence "highly relevant"); 648 (evidence "absolutely crucial to the question of appellants' guilt or innocence"). Similarly, in *Testamark* and the other cases cited by defendants, the evidence was relevant to the guilt or innocence of the accused or a defense which was asserted at trial.

There is one final distinction between the circumstances of the instant case and the factual situations presented

in *Bryant* and its progeny. In the cases cited by the defendants, the Government had failed to preserve relevant evidence for use by the defense in the subsequent prosecution of the individual whom the Government was investigating when it obtained the material. In contrast, in the instant case, the allegedly missing records were gathered during an investigation of Barry Marlin, not the defendants.[9] Defendants argue, however, that specific information concerning the charges contained in the present indictment came to the attention of federal officials in California at least as early as November 9, 1977.[10] It is their contention that they were the targets of an investigation on that date, and that the Government's obligation to preserve potentially exculpatory evidence ac-

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[9] I do not mean to suggest that the Government has no obligation to preserve relevant evidence unless the material is gathered during the course of an investigation of a particular suspect. Rather, this discussion is provided to demonstrate the unique circumstances surrounding the acquisition of the information by the Government and its subsequent transfer to Hittelman for use in the bankruptcy proceedings.

[10] Defendants base their contention on a November 11, 1977 FBI memorandum in which it is revealed that Marlin's attorney, in an apparent attempt to obtain a noncustodial sentence for his client on the California indictment, informed a Special Agent of the FBI that Marlin could testify and provide corroborating evidence that the Friedlands received payments "in excess of $200,000 in 1975" in connection with the loan transactions forming the bases of the charges contained in the present indictment. In addition, Marlin's attorney indicated that his client could provide information implicating the Friedlands in other illegal loans involving the Local 701 Pension Fund. The memorandum reveals that Marlin's attorney was speaking "hypothetically." It should be noted that these discussions were initiated by the FBI.

crued upon receipt of this information from Marlin's attorney. Defendants request an evidentiary hearing, if necessary, to determine the nature and scope of any further investigation conducted by federal officials subsequent to November 1977. In reply, the Government urges that the "trigger date" for its duty to preserve relevant evidence can be no earlier than May 7, 1979 when, in a deposition taken by federal authorities in California, Marlin first provided details of the alleged kickback scheme and defendants' involvement therein.

In light of my conclusion that defendants have failed to establish a sufficient factual basis to trigger an evidentiary hearing with respect to the alleged removal or destruction of discoverable evidence, I need not reach the question of the "trigger date" of the Government's obligation to preserve such material.[11] However, a brief discus-

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[11] By letter dated February 12, 1980, the Government informed defense counsel that copies of certain records obtained in the Cayman Islands during the investigation of Barry Marlin had been "routinely discarded" by a Postal Service Inspector following Marlin's sentencing in April 1978. These documents included records of the First Kensington Bank and correspondence concerning the $3.5 million loan between the Local 701 Pension Fund and the Dunhill Brown Corp. Defendants contend that there is "no longer any question in this case as to whether in fact relevant evidence . . . has been destroyed," and urge the court to determine the date on which the Government's duty to preserve such material accrued. (*See* February 28, 1980 and March 11, 1980 Letter Memoranda of Defendants; *see also* February 7, 1980 Certification at ¶ 7.)

However, by letter dated February 14, 1980 and in a letter memorandum dated March 4, 1980 the Government informed defense counsel that copies of these records were in the possession of Frank Petromalo, Jr., Esq., special counsel to the Local 701 Pension Fund, and were immediately available to the defense.

sion of this issue is in order. I am well aware of the *Bryant* Court's observation that "[t]oo often, what the process purports to secure in its formal stages can be subverted or diluted in its more informal stages," 439 F.2d at 644, and its conclusion that "[o]nly if evidence is carefully preserved during the early stages of investigation will disclosure be possible later." *Id.* at 651. However, I also recognize, and the Government has confirmed, that federal officials frequently receive uncorroborated reports of criminal activity on the part of individuals and simply file the information. As I stated at argument, the fact that government officials in California may have obtained information concerning the offenses charged in the present indictment, and defendants' alleged participation therein, as a result of hearsay statements made by Marlin's attorney while discussing the feasibility of a plea agreement on behalf of his client, without more, would not necessarily mark the commencement of an investigation of these defendants so as to give rise to an obligation on the part of the Government under *Bryant* to preserve discoverable evidence.[12]

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[12] Defendants contend that certain internal memoranda of the SEC, copies of which have not been provided to the court, demonstrate that the SEC had initiated an investigation of the transactions forming the subject matter of the offenses charged in the present indictment as early as June 1976. The Government argues, however, that information gathered by the SEC was turned over to the U.S. Attorney's Office in California and resulted in the indictment of Barry Marlin, discussed *supra*. Contrary to the assertions of defense counsel (February 28, 1980 Letter Memorandum at 5, ¶ 4), although A. Stone Douglas of the Unicorn Group was examined by the SEC with respect to his relation-

(Footnote continued on following page)

Appendix D

Based on the foregoing discussion, defendants' motion for dismissal of the indictment is denied. In addition, defendants have failed to establish a sufficient factual basis to trigger an evidentiary hearing on the alleged destruction of evidence by Barry Marlin. The principles established in *Bryant, Testamark* and the other cases cited by defendants were not intended to operate as discovery devices whereby criminal defendants could obtain pretrial disclosure of evidence that they would not otherwise be entitled to under existing decisional law, *see, e.g., United States* v. *Agurs,* 427 U.S. 97 (1976); *Giglio* v. *United States,* 405 U.S. 150 (1972); *Brady* v. *Maryland,* 373 U.S. 83 (1963), statutory provisions, *see* 18 U.S.C. § 3500, and federal rules, *see* F.R.Cr.P. 16. Rather, cases dealing with the question of the loss or destruction of discoverable evidence represent a logical extension of the principles announced in *Brady* and subsequent Supreme Court decisions to the effect that the suppression of certain evidence may corrupt the truth seeking function of the trial and thereby deprive a criminal defendant of his right to due process of law.[13] Before a federal

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(Footnote continued from preceding page)

ship with defendant David Friedland, it does not appear that the SEC inquired as to whether defendant David Friedland received a "payment" in connection with the $3.5 million loan transaction involving the Local 701 Pension Fund and the Dunhill Brown Corp. (*See* Exhibit B of March 4, 1980 Affidavit of Michael B. Himmel, Special Attorney, United States Department of Justice.)

[13] "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland,* 373 U.S. at 87.

district court should be required to conduct an evidentiary hearing on this issue—and allow defense counsel to cross-examine a key prosecution witness with respect to the existence of and/or destruction of various records,"[14] and federal prosecutors and investigators regarding the nature and scope of their investigations—defendants must provide an adequate foundation to trigger such a hearing. For the reasons discussed *supra,* they have failed to do so.

This conclusion, of course, in no way affects the Government's continuing obligation to provide the defense with "*Brady* material." As I stated at oral argument: "The Government has an obligation to produce Brady material, period. It's their obligation not mine initially. . . . I just remind the Government, when in doubt either bring it to me or turn it over." Tr. of January 28, 1980 Hearing at 30/12-24. The court will enter an order.

DATED: March 25, 1980

[14] February 7, 1980 Certification at ¶ 13(B).